STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 2, 2014
v	No. 315884 Washtenaw Circuit Court
JONATHON LEE AIDEN, Defendant-Appellant.	LC No. 11-001710-FC

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for first-degree murder (under both premeditated and felony-murder predicates), MCL 750.316, safe breaking, MCL 750.531, breaking and entering, MCL 750.110, and conspiracy to commit breaking and entering, MCL 750.110; MCL 750.157a. He was sentenced to concurrent terms of life without parole for the murder conviction, 171 to 600 months for safe breaking, and 62 to 240 months for both breaking and entering convictions. We affirm.

FACTS AND -PROCEEDINGS

The prosecution's theory regarding defendant's guilt was that at some time during the late night of August 17, 2006 and early morning of August 18, 2006, defendant and his uncle Shane Roscoe[1] broke into the Jim Bradley Pontiac car dealership to steal property when they were discovered by William Kenney, a twenty-year employee of the dealership, whom they beat and then struck with a motor vehicle. Kenney was found later that morning in the dealership parking lot with severe head and facial injuries. He later died but not until after making three statements to police about who had attacked him, and picking photographs of defendant, Roscoe, and another individual from an array shown to him.

While in the hospital, Kenney (whom we also refer to as the victim) was interviewed by Washtenaw County Sherriff Detective Mark Neuman. On August 20, 2006, Neuman interviewed the victim while he was in the intensive care unit. The victim did not appear to be

[1] See *People v Roscoe*, 303 Mich App 633; 846 NW2d 402 (2014), in which Roscoe's convictions were upheld under similar challenges.

very alert, was in a fragile state of health, drifted in and out of consciousness and was limited in his ability to speak. Neuman stated that the victim could only give Neuman short yes or no answers, or use very short sentences, and also used non-verbal communication such as shaking or nodding his head. Near the end of the conversation, the victim told Neuman that he thought he was going to die, and asked Neuman to get the victim's mother. Neuman testified that the information he received from the victim was that he was attacked by two white males, one clean-shaven and one with dark hair, who were either current or former employees with the dealership's service department, and who had worked there for less than five years. The admission of these statements is not challenged on appeal.

The statements made on August 23, 2006, are being challenged. On that date the victim was interviewed by Washtenaw County Sheriff Detective Craig Raisanen. Raisanen testified that he and other officers took photographs of as many of the employees at the dealership as possible. From these photographs, as well as from Secretary of State and other database photos, he compiled an array of 41 photographs. Raisanen testified that the victim went through the photographs and initially pulled out five, two of which were of defendant and Roscoe. As he picked the photographs, the victim stated, "definitely," when he chose the picture of Roscoe, and that the photograph of defendant "looked like it could be" one of the attackers. The victim stated that two of the photographs were not pictures of the men who had attacked him; however, the victim also chose a photograph of Kurt Kuehne and stated that Kuehne was "definitely" one of the attackers as well. Raisanen also testified that Roscoe and defendant had worked at the dealership at the same time, for at least a month, a claim supported by the treasurer of the dealership, Coleen Moran.

Kenney was also able to provide some details of the attack. The victim stated that he had been taking out the trash, and was near the dumpster when he saw the two men. The victim also stated that he was attacked by the men and struck with a sledgehammer. The responding paramedics testified that the victim told the paramedics that he had been run over.

On August 26, 2006, Neumann and Detective Thomas Sinks visited with the victim at the hospital. On that day the victim's condition was not much improved, as the victim was only able to talk in fragments of sentences. However, Kenney again stated that one of the attackers had a name that began with an "S" and that he was one of the men the victim had previously picked out of the photos. He also described where that assailant had his mechanic's license on the wall in the shop. Neumann did not show the victim the photographs on that day.

Kimberly Flamino, Roscoe's ex-wife, testified that Michele Valez, Roscoe's sister, was defendant's mother. For a year while she lived with Roscoe, defendant also lived in the home. She stated that, at that time of the attack, Roscoe was not employed. Flamino stated that, on the night of the 17th, she and Roscoe were at home when defendant came over. Roscoe told her that he and defendant were going to get rid of trash. Flamino identified the voice on the 911 recording made from an area near the dealership on the night of the incident as defendant's, although she admitted that she had previously lied to police and told them she did not recognize

the voice.[2] Flamino worked in the medical billing department at the University of Michigan hospital where the victim was taken after the attack, and maintained that Roscoe asked her to check the victim's patient records to see if there was any information about what the victim had stated, and how he was doing. She accessed the records a few times, and was eventually fired because of her actions.

Michael Hatzilias was incarcerated with defendant. Hatzilias provided his phone identification number to defendant so defendant could use it. At one point, defendant asked Hatzilias to make a phone call for him and read a list to the woman who answered. Evidence was also presented that defendant was contacting his mother requesting her to contact individuals to help him form an alibi.

After investigating the break-in at the dealership and what was taken, Raisanen concluded that the person or persons who broke in were familiar with the dealership layout and had specific need for items such as paint, for example. He further testified that a phone call was made from Roscoe's home phone to defendant's cell phone at 5:33 a.m. on August 18, 2006. Other calls were made from Roscoe's phone to defendant's on the 18th, as well as on the 19th and 20th. Roscoe's phone also made a number of calls to a phone number linked to defendant's mother between August 20, 2006 and August 28, 2006. Additionally, defendant's phone was used to make a number of calls to Roscoe's phone on the 17th through the 20th. He also testified that defendant's phone records supported Flamino's testimony that defendant was at her house on the evening of August 17, 2006.

Defendant was interviewed on September 17, 2011, while incarcerated in Florida. During the interview, defendant asked Raisanen what date they thought the assault had occurred and when Raisanen told defendant, he maintained he was not in Michigan at that time. Defendant also acknowledged that the 313-926-0290 phone number was his. Raisanen also testified about phone calls in August and September of 2012 that defendant made to his mother's phone while defendant was incarcerated and played portions of the calls for the jury.

Evidence was also presented that Roscoe searched for news concerning the dealership and the victim on the internet on August 18, 2006, and on other dates after that.

As to the other charges, Moran testified that, when she arrived at the dealership on the morning of August 18, 2006, she discovered the door to the safe room open and that the safe had been damaged. She also testified that a window to the cashier office had been broken, that a number of vending machines were missing their coin boxes along with the bill changer, and that "a goodly number" of bottles of pearlized paint and hardeners were also missing. Another employee testified that the door to the body shop office had been pried open; he also stated that between 40 to 50 bottles of paint and a few gallons of clear coat and hardener were missing from where they were stored.

[2] During cross-examination, Flamino admitted that at the time she changed her initial denials to the police she was in the middle of a custody battle with Roscoe.

The dealership's body shop coordinator testified that she arrived at the office on the morning of August 18, 2006, and discovered that her cell phone, which she had left in the office, was no longer there. She also testified that she did not make a 911 call on the 18th that was listed as coming from her phone, and identified a recording as that of her voicemail message on the phone. As noted above, Kimberly Flamino testified that the voice on the 911 recording was defendant's. The phone was discovered on the morning of August 18, 2006, in an intersection about two miles from the dealership.

ISSUES AND ANALYSIS

CONFRONTATION CLAUSE

In his brief submitted pursuant to Standard 4, defendant argues that the trial court violated his right to confrontation (and MRE 804(b)(6)) by admitting identification evidence in the form of the victim's statements and his choice of defendant's and Roscoe's photographs from an array shown to the victim by the police. Because these statements are "testimonial," and defendant preserved his constitutional claim of error in a motion prior to trial, we review any error in admitting the statements under the harmless error standard applicable to preserved constitutional errors, i.e., we must determine whether "beyond a reasonable doubt that there is no reasonable possibility that the evidence complained of might have contributed to the conviction." *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994) (citations and quotation marks omitted); see also *Giles v California*, 554 US 353, 359-360, 366-367; 128 S Ct 2678; 171 L Ed 2d 488 (2008); *People v Burns*, 494 Mich 104, 111, 114; 832 NW2d 738 (2013); *People v Jones*, 270 Mich App 208, 211-212; 714 NW2d 362 (2006).

STATEMENTS OF AUGUST 20, 2006 UNDER MRE 804(B)(2).

In defendant's statement of questions presented he appears to argue that the victim's statements made on August 20, 2006, were improperly admitted under MRE 804(b)(2), which provides that hearsay is not excludable when the declarant is not available and "[i]n a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." However, defendant does not discuss this issue in the argument section of his Standard 4 brief. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).[3]

[3] In any event, the trial court did not err when it decided that these initial statements fell within the dying declaration exception. The victim had been beaten severely and was in the hospital in the intensive care unit. The victim did not appear to be very alert, was in a fragile state of health, drifted in and out of consciousness, and was limited in his ability to speak. Near the end of the conversation with the investigative officer, the victim told the officer that he thought he was going to die and asked the officer to get the victim's mother. Finally, the statements related to

STATEMENTS OF AUGUST 23, 2006, AND AUGUST 26, 2006, UNDER MRE 804(B)(6).

Defendant argues that the trial court should not have allowed the prosecution to introduce identification evidence under MRE 804(b)(6) consisting of the victim's statements and his act of choosing Roscoe and defendant out of a photo array. The aforementioned rule of evidence provides that hearsay is not excludable when the declarant is not available and the statement is one "offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." The intent requirement of MRE 804(b)(6) is of the same specificity as under the confrontation clause. See *Burns*, 494 Mich at 114. The trial court found that because defendant was responsible, either as a principal or as aider and abettor, for rendering the victim unavailable, the victim's latter statements were admissible under the rule.

In *People v Roscoe*, 303 Mich App 633, 640-642; this Court, in reviewing codefendant Roscoe's identical argument under identical facts, held that the introduction of this evidence was improper:

> Under MRE 804(b)(6), which is commonly known as the forfeiture-by-wrongdoing rule, "[a] defendant can forfeit his right to exclude hearsay by his own wrongdoing." *Burns*, 494 Mich at 110-111. This rule provides that a statement is not excluded by the hearsay rule if the declarant is unavailable and the " 'statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.' " *Id.* at 110, quoting MRE 804(b)(6) (alteration in original). "To admit evidence under MRE 804(b)(6), the prosecution must show by a preponderance of the evidence that: (1) the defendant engaged in or encouraged wrongdoing; (2) the wrongdoing was intended to procure the declarant's unavailability; and (3) the wrongdoing did procure the unavailability." *Burns*, 494 Mich at 115.
>
> The forfeiture-by-wrongdoing rule is also an exception to defendant's constitutional right of confrontation. *Id.* at 111. Both the Sixth Amendment and the court rule incorporate a specific-intent requirement. *Id.* at 111, 113-114. Thus, for the forfeiture-by-wrongdoing rule to apply, the defendant must have specifically intended his wrongdoing to render the witness unavailable to testify. *Id.* at 111, 113. The parties in this case do not dispute that the victim's statement was testimonial and, thus, subject to Sixth Amendment scrutiny.
>
> Defendant argues that the victim's statement made on August 23, 2006, which identified defendant as the attacker, should have been excluded. We agree. However, we find that because the erroneous admission of the evidence was not outcome determinative, reversal is not warranted. The trial court's admission of the victim's August 23, 2006 statement violated both the rules of evidence and defendant's right to confront the witness because the trial court failed to make a

---

the cause of what the victim thought would be his impending death. *People v Stamper*, 480 Mich 1, 3-4; 742 NW2d 607 (2007).

> factual finding that defendant had the requisite specific intent. See *Burns*, 494 Mich at 117. In fact, the trial court stated that the issue of intent was not before the court, which was a clear abuse of discretion because that was the main issue the trial court should have determined.
>
> The prosecution, however, argues that there was sufficient evidence presented from which one could easily infer that defendant intended to murder the victim to prevent him from testifying at trial. However, as was the case in *Burns*, the record does not compel such a finding. *Id.* at 115. Although there was evidence from which to infer that defendant killed the victim because he was caught trying to steal from the dealership, this does not support an inference that defendant specifically intended to kill the victim to prevent him from testifying at trial, particularly given that there were no pending charges against defendant. "[A] defendant's wrongdoing *after* the underlying criminal activity has been reported or discovered is inherently more suspect, and can give rise to a strong inference of intent to cause a declarant's unavailability." *Id.* at 116. In this case, the victim was hit in the head before the breaking and entering had been reported, and there was no evidence that the victim said that he was going to call the police. As our Supreme Court stated, without specific findings by the trial court regarding intent, defendant's action were as consistent with the inference that his intention was that the breaking and entering he was committing go undiscovered as they were with an inference that he specifically intended to prevent the victim from testifying. *Id.* at 116-117. Further, the specific-intent requirement demands that the prosecution "show that defendant acted with, at least in part, the particular purpose to cause [the witness's] unavailability, rather than mere knowledge that the wrongdoing may cause the witness's unavailability." *Id.* at 117. Thus, given that the trial court failed to make findings of defendant's specific intent to prevent the victim from testifying, it was error to admit the victim's August 23, 2006 statement. [Emphasis and brackets in original.]

The prosecution argues that the admission of the victim's August 23rd and 26th statements did not violate the confrontation clause or MRE 804(b)(6) because under *Giles* and its progeny, including *Roscoe*, defendant had forfeited his right to assert the Confrontation Clause by engaging in wrongdoing. For several reasons, we respectfully disagree.

First, the prosecutor's principal argument is that this is not a simple murder case where one person killed another in a heated dispute or through a random act of violence. Instead, because defendant killed the victim after the victim discovered defendant and Roscoe breaking and entering the dealership, the prosecution argues that defendant killed the victim to specifically keep him from testifying at trial, thus satisfying the rule of evidence and constitution. Although this distinction has a great deal of facial appeal, we conclude that the present state of the law does not allow us to accept it. This is primarily because both *Giles* and *Burns* preclude such a reading of the Confrontation Clause.

In *Giles*—a murder case arising in California—the Court made clear that the forfeiture rule under historical Confrontation Clause jurisprudence "applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Giles*, 554 US at 359-360 (emphasis in original). A showing of that purpose is necessary, the Court continued, because

historically the "rule required the witness to have been 'kept back' or 'detained' by 'means of procurement' of the defendant." *Id*. at 360. As a result of this historical view of the forfeiture rule requirements, the *Giles* Court held that evidence that defendant murdered the victim is not alone sufficient to invoke the forfeiture rule:

> The manner in which the rule was applied makes plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying-declarations exception. Prosecutors do not appear to have even *argued* that the judge could admit the unconfronted statements because the defendant committed the murder for which he was on trial. [*Id*. at 361-362 (emphasis in original).]

As a result, the forfeiture rule exception applies only "if the defendant has in mind the particular purpose of making the witness unavailable." *Id*. at 367, quoting 5 C Mueller & L. Kirkpatrick, Federal Evidence, § 8:134, p 235 (3d Ed 2007). Consistent with this, both our Court and our Supreme Court have recognized that the forfeiture rule exception to the confrontation right (and the rule of evidence) requires proof that the defendant had in mind—before the killing—the particular purpose of making the witness unavailable. See *Burns*, 494 Mich at 111-112 and *Jones*, 270 Mich App at 217.

Second, the prosecution's argument fails because the *Giles* majority—as well as Justice Souter in his partial concurrence (joined in by Justice Ginsburg)—emphasized that in a case like this, where the defendant is on trial for the murder of the now unavailable witness, the judge should not be allowed to find defendant guilty (or essentially that) of murdering the to-be-witness before the jury finds defendant guilty or not guilty of that same crime. See *Giles*, 554 US at 374 (SCALIA, J.); *id*. at 379 (SOUTER, J. concurring in part). Here, that is precisely what the trial court would have had to do—decide (likely by a preponderance of the evidence) whether the evidence proved that defendant caused Kenney to be unavailable at trial, i.e., whether defendant killed Kenney. But allowing that to happen is, according to the *Giles* Court, "repugnant to our constitutional system of trial by jury . . . ." *Id*. at 374. It would be completely different if there were facts to present to the court for it to decide defendant's purpose in killing Kenney—like evidence of prior statements or other evidence that reveal defendant's knowledge that Kenney could be a witness against him before killing him. *Id*. at 374 n 6.

The other cases principally relied upon by the prosecutor for application of the forfeiture rule exception to the Confrontation Clause do not convince us otherwise. One case, *United States v Mayhew*, 380 F Supp 2d 961 (SD Ohio, 2005), was decided before *Giles* and relied upon a decision by the Sixth Circuit Court of Appeals, *United States v Garcia-Meza*, 403 F3d 364 (CA 6, 2005), that came down on the wrong side of the *Giles* intent requirement. *Burns*, 494 Mich at 112 n 25. Likewise, *United States v Natson*, 469 F Supp 2d 1243, 1251 (MD Ga, 2006) also predated *Giles* and ruled (incorrectly after *Giles*) that there was no intent requirement under the forfeiture rule. And, lastly, the Colorado Supreme Court's pre-*Giles* decision in *Vasquez v People*, 173 P3d 1099, 1102 (Colo, 2007), contained explicit facts that would allow a court to

find that the defendant's purpose in killing the victim was in part to stop her from testifying against him in court. We have no such facts here.

In any event, the *Roscoe* Court concluded that Roscoe could not show that the erroneous admission of the identification evidence in his trial was outcome-determinative under the standard for unpreserved constitutional error. *Roscoe*, 303 Mich App at 642. Assuming that the admission of the victim's identification of defendant on August 23 and 26 as one of the perpetrators was in violation of the Confrontation Clause and MRE 804(b)(6), we nevertheless hold that the prosecution has established beyond a reasonable doubt that even in the absence of the victim's photo identification of defendant, defendant still would have been convicted of these crimes.

First of all, the victim's identification of defendant's photo was somewhat equivocal, as he merely stated that the photograph of defendant "looked like it could be" one of the attackers. Thus, the identification of defendant was not strong, and its absence does not detract much from the other significant circumstantial evidence supporting defendant's convictions. In his other properly admitted statements, offered in yes or no format response to questioning, the victim maintained that he was attacked by two white males, one clean-shaven and one with dark hair, who were either current or former employees with the dealership's service department, and who had worked there for less than five years. Evidence was presented concerning defendant's employment, which included working at the dealership, as well as other characteristics that he shared with the victim's description.

In addition to the properly admitted (but somewhat vague) identification evidence, other circumstantial evidence tied defendant to the crimes. Roscoe's ex-wife testified that defendant and Roscoe were together on the night of the crimes, and cell phone information supported this. Roscoe's ex-wife also testified that defendant was the caller on the 911 call, which was made from a phone traced to the breaking and entering. Flight evidence, coupled with defendant's attempt at deceit concerning his location, as well as his attempts to create a false alibi, also provide strong circumstantial evidence of guilt. Taken together, we hold that the prosecution did present sufficient evidence, even in the absence of the improperly admitted identification evidence taken from the victim on August 23, to convict defendant of these crimes beyond a reasonable doubt.

Defendant also argues that his counsel was constitutionally ineffective because he failed to request a jury instruction on identification. Effective assistance of counsel is presumed. *People v Mack,* 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish ineffective assistance of counsel, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must establish that "counsel's representation fell below an objective standard of reasonableness . . . ." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), citing *Strickland*, 466 US at 688. The defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). Second, the defendant must show that trial counsel's deficient performance prejudiced his defense. *Strickland*, 466 US at 687. To demonstrate prejudice, a defendant must show the existence of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 491 Mich at 669, citing *Strickland*, 466 US at 694. "A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland*, 466 US at 694.

As noted, defendant argues that trial counsel should have requested that the trial court read CJI2d 7.8, which provides in pertinent part:

> (1) One of the issues in this case is the identification of the defendant as the person who committed the crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it.
>
> (2) In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender before, how far away the witness was, whether the area was well-lighted, and the witness's state of mind at that time.
>
> (3) Also, think about the circumstances at the time of the identification, such as how much time had passed since the crime, how sure the witness was about the identification, and the witness's state of mind during the identification.
>
> (4) You may also consider any times that the witness failed to identify the defendant, or made an identification or gave a description that did not agree with her identification of the defendant during trial.
>
> (5) You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification, because then it may be more reliable. However, you may use the identification testimony alone to convict the defendant, as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime.

The major issue of the case, of course, was whether defendant was one of the men who attacked the victim and participated in the other crimes. When the subject was raised at trial, defense counsel first wanted the instruction read, albeit without paragraph four because it was unnecessary, but then decided (without explanation) not to request it.

In a similar case, *People v Lee*, 243 Mich App 163, 184-185; 622 NW2d 71 (2000), the defendant argued that his trial counsel was ineffective for failing to specifically request an identification instruction. This Court rejected the argument, as well as the concurrent argument that the trial court should have sua sponte given the instruction, because the jury was properly instructed on the elements of the offense, knew that identification was an issue and "also was informed that the prosecutor had to prove beyond a reasonable doubt that defendant was the perpetrator." *Id*. The *Lee* Court concluded that "the record [did] not support defendant's claim that a further instruction on the issue of identity would have, with reasonable probability, changed the outcome of the proceeding." *Id*. at 185.

Given that reasonableness of counsel is presumed, and the decision as to which jury instructions to request is a matter of trial strategy, defendant cannot show that counsel's actions were objectively unreasonable. It is certainly within the realm of strategy for counsel to choose to place his own emphasis on the issue of identity, rather than, for example, have an instruction point out to the jury that they could simply have found the rest of the evidence of little weight and still convicted based solely on the somewhat confused identity testimony of the victim. With respect to prejudice, as in *Lee*, the jury was properly informed of the elements of the offenses, the prosecution's burden of proof, and the fact that they needed to find beyond a reasonable doubt that defendant committed the offenses before they found him guilty. The jury was also well aware that identification of defendant as a perpetrator was disputed, and counsel covered the weakness of the identification evidence thoroughly during closing argument. Defendant is not entitled to relief on this ground.

Defendant next argues that the evidence was insufficient to support his convictions. This Court reviews de novo whether the evidence, viewed in the light most favorable to the prosecutor, was sufficient for a rational trier of fact to find that the essential elements of the crimes were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). Circumstantial evidence and reasonable inferences arising from it may be used to prove the elements of a crime. *People v Brantley*, 296 Mich App 546, 550; 823 NW2d 290, amended in part on other grounds 296 Mich App 801 (2012). "The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

A conviction for first-degree murder requires proof that "the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011). "Premeditation may be established through evidence of (1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide." *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.*

A conviction for felony-murder requires proof beyond a reasonable doubt of: "(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the statute." *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000) (brackets in original; citation, internal quotation marks, and some brackets omitted).

A conviction for safe breaking is governed by MCL 750.531, which provides:

> Any person who, with intent to commit the crime of larceny, or any felony, shall confine, maim, injure or wound, or attempt, or threaten to confine, kill, maim, injure or wound, or shall put in fear any person for the purpose of stealing from any building, bank, safe or other depository of money, bond or other valuables, or shall by intimidation, fear or threats compel, or attempt to compel any person to disclose or surrender the means of opening any building, bank, safe,

> vault or other depository of money, bonds, or other valuables, or shall attempt to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money, bonds or other valuables in any building or place, shall, whether he succeeds or fails in the perpetration of such larceny or felony, be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years.

With respect to breaking and entering pursuant to MCL 705.110, the circumstances of this case required proof of breaking and entering a building with the intent to commit a felony or a larceny therein. MCL 750.110. And generally, a person "who conspires together with 1 or more persons to commit an offense prohibited by law" shall be "punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit . . . ." MCL 750.157a(a); see also *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001).

In reviewing the sufficiency of the evidence this Court considers all the evidence admitted during trial, even if it was erroneously admitted. *McDaniel v Brown*, 558 US 120, 131; 130 S Ct 665; 175 L Ed 2d 582 (2010). Here, then, while some of the identification evidence was improperly admitted, we can still consider this evidence in the analysis of whether sufficient evidence was presented. We have already concluded that even *without* the identification evidence the prosecution proved defendant's guilt beyond a reasonable doubt. For those same reasons, we conclude that *with* the inclusion of this evidence the prosecution presented sufficient evidence to (1) show that defendant was one of the men involved in the assault and other crimes, and (2) to convict defendant of these crimes.[4]

Finally, we reject defendant's claim that he was denied his constitutional right to be tried by a fair and impartial jury. See *People v Jendrzejewski*, 455 Mich 495, 501; 566 NW2d 530 (1997) (citation omitted) ("The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial indifferent jurors") (quotations marks and citation omitted). Defendant bases this claim exclusively on a letter from his trial attorney purporting to relate a post-trial conversation with a former juror. According to the trial attorney, the former juror admitted that, at the time of trial, he and another juror already knew that defendant's accomplice was previously convicted and serving a prison sentence for the underlying robbery and homicide at issue.

"[W]hen information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause." *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998), overruled in part on other grounds by *People v Miller*, 482 Mich 540, 561; 759 NW2d 850 (2008). Defendant cannot establish either *Daoust* prong. Indeed, the impropriety alleged in the letter is not based directly on the juror's knowledge, but instead stems from the speculative assumptions of

[4] Defendant's remaining issues, while listed in his questions presented in his Standard 4 brief, were not discussed in that document. They have been abandoned. *Prince*, 237 Mich App at 197.

defendant's former trial counsel. To wit, the latter explained that based on his conversation with the juror and his memory of voir dire, he was "le[d] to believe" that the juror was either confused or untruthful about his advance knowledge of this case. Thus, it is mere speculation that any impropriety was present in the first place. Defendant therefore cannot establish that the presence of the juror caused prejudice or that the juror was properly excusable for cause, *Miller*, 482 Mich at 561, let alone show the requisite factual predicate to maintain his accompanying ineffective assistance of counsel claim, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

In any event, even setting aside the presumption that jurors follow their instructions to render their verdict based solely on the evidence, defendant cannot assert error where his trial counsel declined to further question this juror during voir dire, even after the juror informed the trial court during voir dire that he had read about the case online when it first happened. See *People v Johnson*, 245 Mich App 243, 250-255; 631 NW2d 1 (2001) (O'CONNELL, P.J., plurality opinion); see also *People v Johnson*, 467 Mich 925, 926-928; 654 NW2d 321 (2002) (CORRIGAN, C.J., concurring in the Supreme Court's order to deny leave to appeal this Court's opinion in *Johnson*, 245 Mich App 243) ("Although the information potentially affecting a juror's ability to act impartially was discovered after the jury was sworn in this case, it could easily have been discovered before that time. Juror 457's response that she had been the victim of an assault put the defendant on notice that follow-up questions were required to flesh out the details. The failure to pose those questions bars relief") (internal citation and quotation marks omitted)[5]; see also *Jendrzejewski*, 455 Mich at 516 ("it is now a well-settled rule that a juror, although he may have formed an opinion from reading such [news] reports, is competent if he states that he is without prejudice and can try the case impartially according to the evidence, and the court is satisfied that he will do so") (citation omitted). Here, a simple follow-up question into the juror's exact prior knowledge of this case or the details of the article the juror had read could have yielded the information upon which defendant bases this argument on appeal. Absent such questioning, however, we are left with speculative argument based on speculative grounds. Reversal is not warranted.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello

[5] While neither this Court's plurality opinion nor Chief Justice Corrigan's concurrence are binding, *People v Sexton*, 458 Mich 43, 65; 580 NW2d 404 (1998); *Fogarty v Dept of Transp*, 200 Mich App 572, 574; 504 NW2d 710 (1993), we find both persuasive.